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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In re)
)
 Amendment of Part 74 of the Commission's) MM Docket No. 93-24
 Rules With Regard to the Instructional)
 Television Fixed Service)

**REPLY COMMENTS OF
 THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its reply to the comments filed in response to the *Notice of Proposed Rulemaking* ("NPRM") commencing this proceeding.^{1/}

I. INTRODUCTION.

In its initial comments, WCA proffered tepid support for the Commission's proposal to eliminate the A/B cut-off list approach that currently governs the filing and processing of applications for new facilities and major modifications in the Instructional Television Fixed Service ("ITFS") and to substitute a window filing procedure similar to that used in the Low Power Television Service. As WCA explained in its comments, while the wireless cable industry is generally supportive of any rule change that will expedite the processing of ITFS

^{1/} *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, FCC 93-90, MM Docket No. 93-24 (rel. Feb. 25, 1993)[hereinafter cited as "NPRM"].

applications, a window filing procedure likely will further exacerbate the already-rampant abuse of ITFS excess capacity leasing for speculation and greenmail.^{2/}

WCA was hardly alone in its concern. The National ITFS Association ("NIA"), American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association of Higher Education,

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Fortunately, the comments submitted in response to the *NPRM* contain several proposals that, if implemented in tandem with the ITFS filing window procedure, should deter speculative ITFS applications without unduly hindering legitimate wireless cable operators.^{4/} What follows are WCA's views on those proposals.

II. DISCUSSION

A. The Commission Should Require An ITFS Applicant That Relies On A Wireless Cable Operator For Funding To Include A Demonstration Of That Operator's Financial Qualifications.

In its comments, WJB-TV called upon the Commission to require any ITFS applicant that relies on a wireless cable operator to fund its proposed facility to provide the Commission with documentary evidence that the wireless cable operator has the financial wherewithal to construct that facility and all others that the wireless cable operator is committed to construct.^{5/} WCA believes that is a meritorious suggestion which, if adopted, could deter many of the ITFS speculators.

^{4/} That is not to say that all of the alternative proposals advanced by the other commenting parties are deserving of adoption. For example, WCA finds troubling the proposal by NIA for a separate filing window open only to applicants who certify that they have not entered into an excess capacity lease. *See* NIA Comments, *supra* note 3, at 4. The opening of such a filing window would be fundamentally unfair to the many educational entities that see the significant benefits of leasing and desire to take advantage of the opportunities leasing provides. What NIA appears to assume, but cannot substantiate, is that ITFS licensees who do not lease provide a superior educational service compared to those ITFS licensees that do lease excess capacity. Unless and until it can be established that those who do not lease provide a qualitatively superior service, there is no logical basis for a special filing window reserved for non-leasing applicants. To do as NIA suggests would foreclose applicants that could provide the best possible service (relying on leasing arrangements to generate the revenue necessary to produce high-quality programming) from filing, to the obvious detriment of students, teachers and life-long learners.

^{5/} *See* WJB-TV Comments, *supra* note 3, at 9-10.

In other services, the Commission has recognized that requiring a demonstration of financial ability is essential to deterring speculation.^{6/} ITFS should be treated no differently. As WJB-TV correctly notes in its comments, the Commission's current reliance on applicant certifications to ascertain the financial qualifications of wireless cable operators does little to deter speculative filings.^{7/} Indeed, a review of the Commission's files illustrates that serious questions have often been raised regarding the financial qualifications of the firms that have been most often charged with speculative behavior.^{8/} Requiring that those who promise to fund ITFS stations prove that they will actually fulfill those promises will be a tremendous step forward in the war against speculation and greenmail.

B. The Commission Should Adopt A Filing Window Schedule Along The Lines Suggested By The Educational Parties, But With Additional Windows.

As WCA noted in its comments, it is seriously concerned that the Commission will open ITFS filing windows so infrequently that the licensing of critical new and modified ITFS

^{6/} See, e.g. *Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Band and to Establish Rules and Policies for Local Multipoint Distribution Service*, FCC 92-538, at ¶¶ 46-47 (rel. Jan. 8, 1993); *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896 - 901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, 8 FCC Rcd 1469, 1475 (1993); *Amendment of the Commission's Rules to Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 2227, 2231 n.47 (1993).

^{7/} See WJB-TV Comments, *supra* note 3, at 9.

facilities will be delayed.^{9/} Therefore, WCA applauds the suggestion by the Educational Parties to establish a firm schedule of filing windows.^{10/} However, WCA believes that more than just the two annual windows proposed by the Educational Parties are necessary. Given the resurgent demand for new ITFS facilities spurred by the emergence of wireless cable, WCA believes that the scheduling of at least one window a quarter is necessary to avoid unduly delaying the licensing of ITFS facilities essential to the growth of the wireless cable industry.

The Educational Parties suggest in their comments that additional filing windows be opened periodically for the filing of major change applications.^{11/} WCA supports that proposal, so long as it is implemented in a manner that does not preclude competing applications. As the Educational Parties correctly note, ITFS major change applications represent a minuscule proportion of the Commission's ITFS workload. Yet, the granting of major change applications is often an essential predicate to the launch of a wireless cable system, since it is frequently necessary to modify existing ITFS facilities to co-locate with the Multipoint Distribution Service stations that will comprise the wireless cable system. Thus, any action the Commission can take to expedite the processing of major change applications will be applauded by the wireless cable industry.

^{9/} See WCA Comments, *supra* note 2, at 9-10.

^{10/} See Educational Parties Comments, *supra* note 3, at 11-12.

^{11/} See *id.* at 12-13.

However, the Commission must assure that major change applications are processed in a manner that will not foreclose the filing of mutually-exclusive applications by others. By definition, implementation of a major change has the potential of preventing the establishment of cochannel facilities in nearby markets and adjacent channel facilities in the same market. WCA is particularly fearful that a special filing window for major changes will present greenmailers an opportunity to make uncontested changes designed to frustrate the development of nearby wireless cable systems. If a special filing window is opened for major change applications alone, some other mechanism should be used to assure that applications for new facilities are not precluded without affording potential ITFS licensees an opportunity to apply. WCA suggests as a possible solution that the Commission use an A cut-off list to provide an opportunity for filing new applications that are mutually exclusive with major change applications filed during the filing window.

C. The Commission Should Implement A Modified Version Of The Application

been granted; and (iii) it agrees to construct any facility authorized as a result of expedited processing within six months after the applications have been granted.^{12/}

From discussions with counsel for the Educational Parties, WCA understands that the Educational Parties will be proposing a modification to WCA's priority system under which ITFS applicants proposing to develop facilities without leasing excess capacity would also be entitled to a priority upon committing to rapid construction. WCA wholeheartedly supports that modification to WCA's prioritization proposal. An ITFS applicant proposing a facility that will not be part of a wireless cable system should be able to free itself from the logjam created by speculative ITFS applications. Adoption of the Educational Parties' proposal will permit that to occur, without opening the floodgates to applicants fronting for speculators and greenmailers.


^{12/} See WCA Comments, *supra* note 2, at 7-8.

III. CONCLUSION.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to adopt the proposal set forth in the *NPRM*, subject to the additional rules and policies advanced in WCA's initial comments and above.

Respectfully submitted,

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